PRESERVATION NATION

2021 Edition

UNDERSTANDING LONG-TERM CARE MEDI-CAL

Comprehensive Legal Guide

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About the Author

Christopher E. Botti is a Board-Certified Specialist in Estate Planning, Trust and Probate Law, a field that includes Elder Law. The California Board of Legal Specialization estimates that only three percent (3%) of practicing attorneys in California can call themselves a “Certified Specialist.”

Mr. Botti co-founded the firm of Botti & Morison Estate Planning Attorneys in 2003.The company has grown to six offices and has become one of the largest firms devoted to estate planning in California. Mr. Botti’s practice is restricted to Long-Term Care Medi-Cal planning, estate planning, asset protection, special needs planning, estate and trust administration as well as probate. He has helped thousands of clients plan for the challenges of confronting long-term care and incapacity during his thirty plus year career.

Christopher E. Botti established Preservation Nation in 2020 with the mission to educate individuals about the importance of long-term care estate planning as well as to dispel the myths and rumors that are prevalent in the area. He is a member of the National Academy of Elder Law Attorneys (NAELA) and ElderCounsel. Members of NAELA are attorneys who are experienced and trained in working with the legal problems of older Americans.

Mr. Botti was born in Brooklyn, New York in 1964. He received his B.S. in Business-Economics from the State University of New York, College at Oneonta in 1987. He obtained his J.D. from Whittier College School of Law in 1990 and served as an editor for the Whittier Law Review.

What is Long-Term Care Estate Planning

Long-term care estate planning involves two primary objectives.

The first is to plan for incapacity. According to the Center for Disease Control and Prevention, 19.5% of adults over the age of 65 reported a lot of difficulty or an inability to perform at least one of the six domains of functioning – seeing, hearing, mobility, communication, cognition, and self-care. With proper legal documents, trusted individuals can be placed in a position to make financial and medical decisions for you without the need for judicial intervention.

The second objective is asset preservation. According to the California Partnership for Long-Term Care, two out of three Californians will need long-term care. A well-crafted, comprehensive long-term care estate plan will put you in a legal position to avail yourself of certain government programs that help pay for the costs of long-term care.

The primary cause of poverty among those sixty-five and over is failing to prepare for the cost of a nursing home stay or other long-term care. Nursing home costs in California average over one hundred and twenty thousand dollars ($120,000.00) annually. The average lifetime length of stay in a nursing home is approximately 2.3 years as reported by the California Partnership for Long-Term Care.

Long-term care is getting more expensive every year, with cost increases far exceeding the pace of inflation. By far the biggest concern of my clients who are over the age of sixty-five is the fear of losing everything if they get sick and can't afford to pay for the appropriate care.

Why Your Estate Plan Must be Long-Term Care Compliant

A typical estate plan consists of a Living Trust, Will, Durable Power of Attorney, and an Advance Health Care Directive. Under California Law, it is critical that these documents are integrated and contain provisions to allow for long-term care planning to occur in the event of incapacity. You cannot prepare the necessary legal documents once you lose legal capacity. Moreover, your existing documents cannot be repaired if they are deficient once incapacitated. Your only option is an expensive, time consuming, and humiliating probate procedure known as Conservatorship.

The good news is that the risk of Conservatorship can be virtually eliminated with proper long-term care estate planning. Planning techniques and strategies outlined in this eBook can protect your estate, including your home, allowing you to leave a legacy for your family. But, in order to avail yourself of these legal strategies, it is critical that your existing estate planning documents are long-term care compliant.

Because this planning often involves "self-dealing" transactions, it is essential that your legal documents have the express power to engage in these activities. Nest egg preservation not only benefits you, but it also benefits your family. Both your Living Trust and your Durable Power of Attorney must have reciprocal provisions that include the express power to amend, revoke, and create new estate planning documents. Your estate planning documents must also include the power to gift, transfer, and recharacterize assets, all on your behalf with the goal of protecting your nest egg. These powers should only be conferred upon those you trust implicitly. The successor trustees and agents that you appoint in your documents are fiduciaries and are held to the highest standard under California Law.

The vast majority of the estate plans that I have reviewed during my 30-year career fall short when it comes to long-term care compliance. It should come as no shock that the documents that were either self-drafted or prepared by non-attorneys were grossly inadequate. But surprisingly many attorney drafted plans were also lacking critical provisions because those attorneys were either generalists or lacked experience in Elder Law.

Flexibility is key when it comes to long-term care estate planning. You must plan ahead. Laws and regulations change frequently in this area. Decades often go by between the time of the creation of your estate planning documents and the time they are actually needed.

Your estate planning documents must contain provisions that allow you or someone on your behalf to navigate the laws and regulations that exist at the time this planning is needed. You also want to be in a position to avail yourself of the current, state of the art legal strategies.

Long-Term Care Payment Sources

There are only 5 ways to pay for long-term care in California:

1. **Private Pay**
   The average cost of a nursing home in California in 2021 is $10,298.00 per month. The average lifetime length of stay in a nursing home is approximately 2.3 years. Therefore, bankruptcy is a real threat to a family with modest or limited means.

2. **Medicare**
   As shown below, Medicare falls short in almost every long-term care situation.

3. **Long-Term Care Insurance**
   A key planning tool if you have it and can afford to keep it. Payouts vary and are subject to individual policy terms.

4. **Veterans Benefits**
   If you meet the strict eligibility requirements, then Veterans Benefits can provide a measure of relief and should not be dismissed.

5. **Long-Term Care Medi-Cal**
   Long-Term Care Medi-Cal will pay for your nursing home care if you meet the surprisingly liberal eligibility requirements.

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Medicare versus Medi-Cal

In order to understand Long-Term Care Medi-Cal, you must first understand how it is different from Medicare. Medicare and Long-Term Care Medi-Cal are separate and distinct programs. Once you understand these differences, you will realize why Long-Term Care Medi-Cal is the only program capable of paying for continual long-term care.

Medicare

Medicare is a federal entitlement program that provides health and medical benefits to Americans sixty-five and older. Medicare is funded with Social Security deductions. All persons over sixty-five or older who have made Social Security contributions are entitled to the benefits, as well as persons under sixty-five with disabilities who have been eligible for Social Security disability benefits.

Medicare is not based on financial need. Any individual who meets the age, disability, and coverage requirements is eligible. Participants are responsible for co-payments and deductibles. Medicare does not pay for all medical expenses, and often must be supplemented with private insurance.

There are four parts to Medicare.

Part A	Covers limited hospital expenses; Acts like health insurance
Part B	Covers outpatient care
Part C	Allows private companies to offer supplemental plans to Medicare
Part D	Covers prescription drug expenses

By far the greatest Medicare myth is that it will pay for long-term care costs.

Don't fall into this trap. The truth is that it only provides limited coverage. It was never designed to cover long-term care. Many people don't realize the long-term care limitations of Medicare until it is too late.

Medicare will only cover nursing home expenses if it follows a three day stretch in a hospital (not including the date of discharge). If that first requirement is met, then Medicare will pay up to 20 days of care in a nursing home for rehabilitation purposes only. It will not pay for care in an assisted living facility or residential care home. From day 21 to day 100, a co-payment will be required of $185.50 per day provided that rehabilitation continues. The co-payment amount adjusts for inflation every year. Home health care may be provided in Part A if it is "medically necessary," an exceptionally difficult standard to meet.

Medicare benefits are fleeting and require deductibles as well as co-payments that can eat into your nest egg. The average stay in a nursing home under Medicare is usually less than 24 days. There is no Medicare coverage for nursing home care beyond 100 days in any single benefit period. Thus, few can look to Medicare to pay for any substantial nursing home costs.

Long-Term Care Medi-Cal

Long-Term Care Medi-Cal, as opposed to an entirely separate program known as "Community Based Medi-Cal," is California's version of Medicaid for individuals sixty-five and older. It is supported by both state and federal funds. Long-Term Care Medi-Cal is need-based and eligibility primarily depends on the amount of income and resources. There are two assessments that must be completely satisfied before Long-Term Care Medi-Cal will pay for nursing home care.

The Medical Assessment

Prior authorization is a prerequisite for nursing home coverage. You need a doctor's order and your stay must be "medically necessary."

The Asset Assessment

Long-Term Care Medi-Cal classifies property as either "exempt" or "non-exempt." Exempt property means it does not count toward eligibility regardless of its value. Every penny of non-exempt property counts. If an individual does not have less than $2,000.00 in a non-exempt property ($3,000.00 where both spouses are receiving Long-Term Care Medi-Cal) at any point during a given month, they will not be eligible or will lose their eligibility.

This is where the devastating myth that you can "only have $2,000.00 in your name" comes from. Nothing could be further from the truth as shown below.

Exempt Assets include:

1. **Your home**
   Your home is totally excluded provided that it is your principal residence and you declare that you would return home if you could. This intent to return home is subjective and does not require that you are physically able to return. As long as you declare that you would return if you could, the home, regardless of its value, is exempt. Failure to properly answer this question on the Long-Term Care Medi-Cal application or on follow up documentation issued by the county eligibility worker could result in the denial of benefits or make it vulnerable to state recovery efforts.

   The term "home" is broadly defined and includes mobile home, manufactured home, and houseboat. Remarkably, the home can mean an entire multi-unit dwelling as long as any portion acts as your principal residence. It can also include a farmhouse on a small parcel as well as all of the surrounding acreage as long as it is contiguous with the parcel containing the home. Surrounding buildings are also exempt. See California Welfare and Institutions Code Section 14006(b). Tremendous planning opportunities exist because the definition of a home is so broadly defined.

2. **IRAs and pensions**
   Retirement accounts and plans are most individual's second-biggest exempt assets. IRAs and pensions are considered exempt if you are taking the required minimum distributions (RMDs).

3. **Community Spouse Resource Allowance (the "CSRA")**
   This is perhaps the third largest source of exempt assets for married couples. The Community spouse (well spouse at home) may retain up to $130,380.00 in assets on top of the home and other exempt assets, such as IRAs and retirement funds.

4. **Household Goods and Personal Effects**
   There is no limit as to the value of these items.

5. **Jewelry**
   For a single person, a wedding, engagement rings, and family heirlooms are totally exempt. Other jewelry with a total net market value of $100 or less is also exempt. There is no limit on exempt jewelry for those who are married and one spouse is in a nursing home.

6. **Vehicles**
   One vehicle (car, truck or motor home) for transportation purposes, regardless of value. For example, if the only vehicle that you had was a $500,000.00 motor home, then it would be exempt.

7. **Life Insurance/Term Life Insurance**
   Policies with a total face value of $1,500.00 or less are exempt. If the total face value of the policy exceeds $1,500.00, then the cash surrender value is counted toward the $2,000.00 ($3,000.00 for a married couple both seeking benefits) property reserve. If the cash surrender value exceeds the $2,000.00 property reserve, the applicant will not be eligible unless they reduce the value of the policy to below $2,000.00. Term life insurance is excluded without limitation.

8. **Burial Plots/Burial Plans**
   Burial plots are excluded, along with irrevoca-ble burial plans. A burial fund of $1,500.00 or less is exempt as long as the funds remain in an account earmarked for burial expenses.

9. **Certain annuities**
   The annuity rules are complex and require evaluation on a case by case basis. Some are exempt, most are not.

10. **Business Property**
    This is another potentially very large exemption. Property used as a business or as a means of self-support is exempt. Real property that is rented, however, will not be exempt unless the property is demonstrably operating as a business. You must prove with tax returns or other credible evidence that the property is clearly a "business," not just investment property. See 22 California Code of Regulations Section 50485(d) and All County Welfare Directors Letters "ACWDL" 91-28.

11. **Unavailable Property**
    If you have made a "bona fide effort" to meet the asset test but you are unable to do so, you can still be eligible. For example, if you have made a good faith effort to sell the non-exempt property such as real estate, business interests, securities, or property co-owned with a third party but cannot because of market conditions or other legal limitations on the sale or transfer, the property will not be included as a countable asset. See California Welfare and Institutions Code Sec-tions 50416, 50417.

12. **After Acquired Property**
    Once the ill spouse is eligible for Long-Term Care Medi-Cal, any resources acquired after eligibility by the community or well spouse are protected and will not affect the ill spouse's eligibility. For example, if the community spouse inherited $750,000.00 after their spouse was eligible for Long-Term Care Medi-Cal, they could keep this without affecting the other spouse's eligibility. Moreover, if the ill spouse receives an inheritance after obtaining Long-Term Care Medi-Cal it can also be protected by transferring the inheritance out of their name by the end of the month in which the inheritance was received.

    However, if the ill spouse lacks legal capacity, then this type of planning requires a Durable Power of Attorney with express gifting language over separate property. Otherwise, the ill spouse will lose eligibility. This is yet another example of why it is critical that your estate planning documents are long-term compliant.

Spousal Impoverishment Laws

There are two main spousal impoverishment laws, one for assets and one for income.

The first is the Community Spouse Resource Allowance (CSRA).

The CSRA is designed to prevent the well spouse from becoming financially destitute by allowing them to retain additional assets. The CSRA increases every year according to the Consumer Price Index. The current (2021) CSRA is $130,380.00. The non-exempt community property, as well as separate property of both spouses, will be counted and subjected to the $130,380.00 limit. Exempt assets such as the home, IRAs, household goods, personal effects, a car, jewelry, etc., do not count towards the CSRA are all totally excluded, regardless of value.

The existence of the CSRA provides significant planning opportunities. For example, a vacation home can be exempted and protected by using the CSRA because the value for Long-Term Care Medi-Cal qualification purposes of the additional real estate in California is one of the following, whichever is less (i) the assessed value determined under the most recent property tax assessment or (ii) the appraised value by a qualified real estate appraiser. See 22 California Code of Regulations Section 50412. Many married people have assessed values of second properties far below the CSRA of $130,380.00 when compared to actual market value due to Proposition 13.

The second major California spousal impoverishment law is designed to protect income.

It allows the community or well spouse to retain a maximum monthly maintenance needs allowance (the "MMMNA"). The MMMNA is $3,260.00 per month in 2021. This amount is adjusted annually by the cost of living increases. Under the "name on the instrument rule," the community spouse (at-home spouse) may retain any income received in their name alone, even if this exceeds the MMMNA. For example, if the community spouse's monthly income (in his or her name alone) is $12,000.00, the community spouse may keep it all. If fact, there are no income limits imposed under the Long-Term Care Medi-Cal program. If the community spouse's monthly income is less than the MMMNA of $3,260.00, they may receive an allocation from the ill spouse's income until they reach the $3,260.00 MMMNA.

What if the combined income of both spouses is below the $3,260 MMMNA? This opens the door to further planning opportunities. The CSRA can be increased so that the community spouse can keep additional assets capable of generating the necessary income to achieve the full MMMNA. Because of the extremely low-interest rates, it is relatively easy for a community spouse to establish that they need to retain assets above the CSRA to generate additional income. The expansion of the CSRA can occur either in the probate court or through an administrative "fair hearing" depending on the circumstances. The choice of which venue to pursue should be made by a qualified Elder Law attorney.

The MMMNA can also be expanded through the legal process if the community spouse can demonstrate exceptional circumstances which would cause extreme financial distress to exist if the MMMNA were not increased. For example, extraordinary medical expenses for the at-home spouse could result in extreme financial distress warranting an increase in the MMMNA. Again, any attempt to increase the MMMNA should be made by a qualified Elder Law attorney.

Share of Cost

If you have income and are receiving Long-Term Care Medi-Cal, you must pay a "share of cost" of the nursing home charges in most situations. Share of cost is your co-pay and is calculated by the Medi-Cal office. Once you pay the share of the cost, Medi-Cal will pay the facility the difference between the share of cost and the Medi-Cal per diem rate.

> Legal strategies are available to reduce or eliminate your share of cost.

You may deduct the costs for uncovered medical expenditures, such as certain drugs, hearing aid batteries, extra eyeglasses, dentures, etc., as well as other medical supplies not covered under the Long-Term Care Medi-Cal program. A physician's prescription is compulsory, and the items must be a part of the physician's care plan.

It is important to understand that if an individual qualifies for Long-Term Care Medi-Cal, they do not need private "Medigap" or HMO insurance. However, if such insurance exists the premiums are deducted from your income when computing the share of cost. Thus, the insurance does not cost anything.

Beware of the Lookback Rule

Many uninformed individuals start gifting assets in a misguided attempt to get to a level where they "only have $2,000.00" in their name.

> Improper gifting or transfer of assets will render a person ineligible for a period of time running from the date of the transfer.

The Long-Term Care Medi-Cal application will ask if the applicant transferred or gifted any assets within the 30 months prior to the date of the application. This is known as the lookback rule.

What happens when you make a mistake and improperly transfer non-exempt assets? A transfer of non-exempt assets will result in a "period of ineligibility" which is the lesser of 30 months or the value of the transferred assets divided by the average private pay rate (the "APPR") of a skilled facility in California at the time of application. The 2021 APPR is $10,298.00 and is adjusted upward every year. California rounds down and does not count partial months when calculating the period of ineligibility.

The lookback rule applies only to non-exempt assets. You can make a gift of any exempt property such as the home, wedding ring, car as well as additional assets protected under the CSRA at any time without affecting eligibility. This particular transfer rule opens the door to moving assets to what I call an "Irrevocable Medi-Cal Asset Preservation Trust", also known as an Intentionally Defective Grantor Trust. This type of trust is an advanced estate planning vehicle and should only be prepared by an experienced Elder Law attorney. A further discussion of the Irrevocable Medi-Cal Asset Preservation Trust in action is set forth in the examples below.

Not all transfers of non-exempt assets trigger the lookback rule Transfer penalties will not apply if the transfer was made for one of the following reasons:

(1) with the intent to dispose of the resource either at fair market value or for other valuable consideration;

(2) exclusively for a purpose other than to qualify for Long Term Care Medi-Cal;

(3) to a spouse;

(4) to a blind or totally disabled child of any age;

(5) if denial of eligibility would result in undue hardship; and last, but not least,

(6) **if the amount transferred per day is less than the APPR of $10,298.00.**

The sixth exemption allowing for the transfer of less than the $10,298.00 per day is noteworthy. You can make multiple transfers because each transfer is considered separately from all other transfers provided that the transfer is not greater than one transfer per person, per account, per day. This technique is known as "stacked gifting." Amazingly, it is allowable under current law. Unfortunately, stacked gifting will be eliminated when California eventually updates its regulatory scheme.

It is important to note that if a transfer is being made on behalf of a person who lacks legal capacity, then express and unlimited gifting powers must exist in the estate planning documents. A long-term care compliant estate plan would contain these critical provisions.

> Failure to have the legal authority to make gifts could result in allegations of financial elder abuse, fraud and breach of fiduciary duty.

Therefore, extreme caution is urged, and you should only engage in this type of gifting with the guidance of an Elder Law attorney. Gifts or transfers of any kind should only be made when they are in the best interests of the Long-Term Care Medi-Cal applicant.

Long-Term Medi-Cal Planning in Action. Examples of How to Zero Out Excess Resources

In performing an analysis to determine if a client can qualify for Long-Term Care Medi-Cal, I create two columns of assets. The first column is the "Exempt" column. As you learned above, exempt assets do not count towards eligibility regardless of their value. The second column is for the non-exempt assets that I call "Excess Resources" and every penny counts.

> The goal of Long-Term Care Medi-Cal planning is to "Zero Out" the Excess Resources Column.

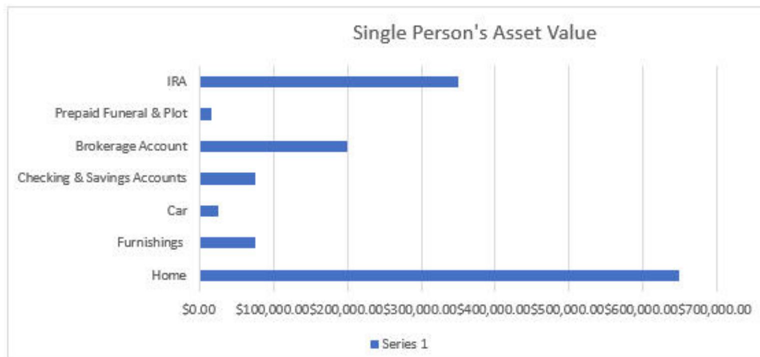
This can be accomplished in a number of ways using various strategies. These strategies vary from case to case. Asset configuration, the size of the estate, the individual's medical needs as well as the family dynamic all play a role in determining which strategy would work best. Transparency is the name of the game and all those affected by the qualification strategy should be involved. If at the end of the day the best interests of the Medi-Cal applicant would not be served by moving forward, then other alternatives must be considered and implemented.

Here are two examples of Long-Term Care Medi-Cal planning in action:

Example One. Single Person

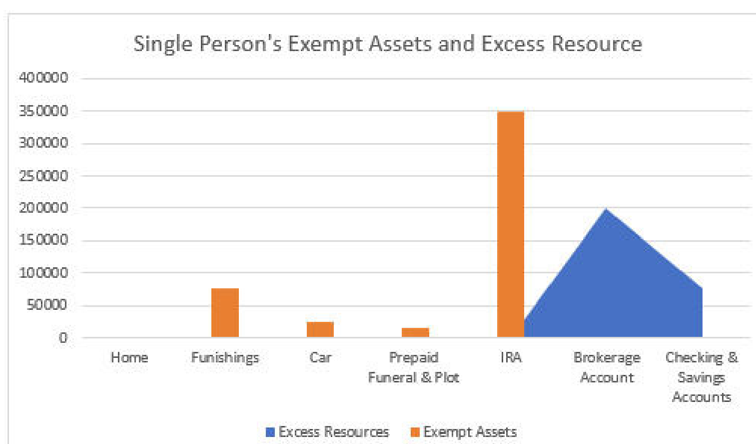
Alice is an 85-year-old widow with four children. She has worked extremely hard all of her life, paid her taxes, and wants to leave a legacy to her children upon her death. She had a devastating stroke and needs immediate placement in a nursing home.

Here is a breakdown of her total assets:



1. $650,000.00 home
2. $75,000.00 furnishings
3. $25,000.00 car
4. $15,000.00 prepaid funeral and plot
5. $350,000.00 IRA
6. $200,000.00 brokerage account
7. $75,000.00 combined checking and savings account

Total Value of all assets: $1,390,000.00



Exempt Assets in Orange:

Alice's Exempt assets include the following:

8. $650,000.00 home
9. $75,000.00 furnishings
10. $25,000.00 car
11. $15,000.00 prepaid funeral and plot
12. 350,000.00 IRA because she is taking her Required Minimum Distributions (RMDs)

Total Value of Exempt Assets: $1,117,000.00

Excess Resources in Blue:

1. $200,000.00 brokerage account
2. $75,000.00 combined checking and savings account

The total of Alice's Excess Resources is $273,000.00 ($275,000.00 minus the $2,000.00 property reserve). Alice is not currently eligible for Medi-Cal benefits because her property reserve exceeds the allowable $2,000.00 by $273,000.00. She needs to Zero Out her excess resources. How can she do that and qualify?

POSSIBLE ZERO OUT STRATEGIES:

The Spend Down Approach:
Using this strategy, Alice would spend her excess $273,000.00 non-exempt assets on any item that would benefit her. There is no requirement that the excess resources be used to pay her medical or custodial care needs. For example, she can use the money to improve her house and purchase furniture. She can buy appliances or clothes. There is no limit as long as the expenditures "benefit" her. Since Alice may realize capital gains from the sale of her investments a tax analysis must be performed. Alice will become eligible for Medi-Cal on the first day of the month in which she depletes her available Excess Resources to $2,000.00 or less by the last day of that month.

The Conversion Approach:
Alice may zero out her excess resources by converting them to exempt. Once the non-exempt assets have been converted, Alice can transfer the exempt assets without incurring a transfer penalty. The best conversion strategy concerns Alice's home. Alice could use her excess resources to pay off the $250,000.00 mortgage thereby converting most of her excess resources to an exempt asset. She can also perform deferred maintenance on her home and zero out the rest of the excess resources.

The Gifting Approach:
Under this method, Alice could transfer all of her non-exempt assets using the stacked gifting approach to her children. Gifts outright to her children without strings attached is not generally recommended as those assets once transferred would be exposed to the creditors as well as the whims of her children. The better approach would be to establish an Irrevocable Medi-Cal Asset Preservation Trust and transfer her non-exempt assets to this trust using the stacked gifting method.

There is no transfer penalty where the asset(s) transferred were exempt for eligibility purposes at the time of transfer. Therefore, stacked gifting does not need to be employed for exempt assets because there is no limit on the value of the asset transferred. The transfer of the home, which is the largest exempt asset, can be done all at once with one deed (as opposed to fractional deeds using the stacked gifting approach for non-exempt real estate) and would not trigger the lookback rule.

The Wonders of an Irrevocable Medi-Cal Asset Preservation Trust

Oftentimes long-term care estate planning includes the creation of an Irrevocable Medi-Cal Asset Preservation Trust, also known as an Intentionally Defective Grantor Trust that will be the recipient of all Excess Resources. The term "Intentionally Defective" does not mean the trust will not serve its intended purpose or is invalid under the law. Intentionally Defective is a tax planning term of art and means that the assets placed in this trust will be included in the individual's estate for federal estate tax purposes. As long as the estate is less than the current 2021 Federal Estate Tax Exemption of $11.7 million, the entire amount will pass to the beneficiaries completely tax-free. The trust will also be treated as a pass-through entity for federal and state income tax purposes.

> The Irrevocable Medi-Cal Asset Preservation Trust is cutting edge and is a tool in the arsenal of most Elder Law attorneys.

The transfer of Alice's home, along with other assets to an Irrevocable Medi-Cal Asset Preservation Trust would accomplish all of the following:

1. Alice would be able to maintain management and control of her home, including the right to live in her home for the rest of her lifetime by preserving a right to occupy rent-free;

2. Alice's beneficiaries named in the trust can receive the home as well as the other assets transferred as an inheritance upon her death;

3. Alice would minimize the potential for family and beneficiary conflict;

4. Alice would empower the trustee of the irrevocable trust to take control of the home in the event of her incapacity or death and thereby eliminate the need for conservatorship or probate;

5. Alice would avoid estate recovery on any claims made by the Estate Recovery Section of the California Department of Health Services at her death for Medi-Cal benefits paid to her during her lifetime;

6. Alice would subject her home to inclusion within her federal taxable estate for federal estate tax purposes within the scope of the tax rules established by Trotter v. Commissioner, T.C. Memo 2001-250 (2001) and Linderme Estate v. Commissioner, 52 T.C. 305 (1969), in order to establish a cost basis increase for the home. The new cost basis would be the date of death value thereby eliminating the tremendous built-in capital gains in her residence. A step-up in basis would not have occurred if she had gifted the home outright to her children prior to her death;

7. Alice would preserve her continuing eligibility for Medi-Cal benefits;

8. Alice could retain the right to name new beneficiaries of the trust upon her death using a "limited power of appointment";

9. Alice could retain the right to change or add trustees;

10. The trust would be treated as a grantor trust for income tax purposes, thereby preserving her IRC §121 capital gains exemption upon the sale of a principal residence, should she or the Trustee decide at a later date to sell the home; and

11. Alice would protect the trust assets from the claims of her beneficiaries' creditors in the event of their subsequent disability, death, bankruptcy, or divorce.

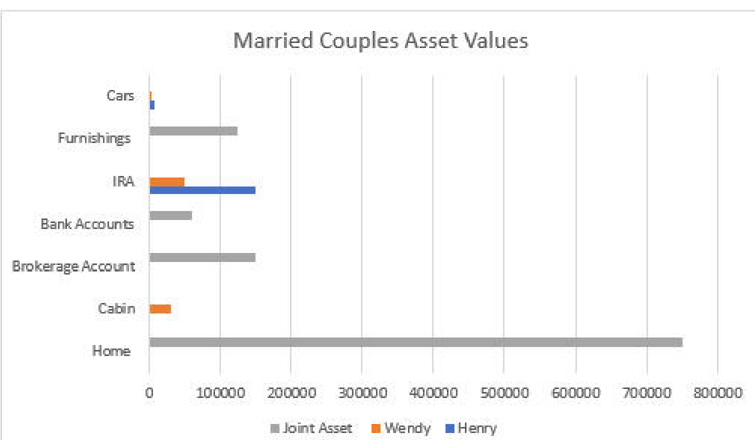
Combined Approach: Alice can use a combination of all three approaches to Zero Out her Excess Resources to $2,000.00 or less.

Recovery Protection: All assets placed into the Irrevocable Medi-Cal Asset Preservation Trust would escape any recovery efforts. Moreover, the remaining balance of her IRA would transfer to her children free of recovery. As long as Alice does not have a “probate estate” her entire remaining nest egg will transfer to her children upon her death. See below for a further discussion about estate recovery.

Example Two. Married Couple

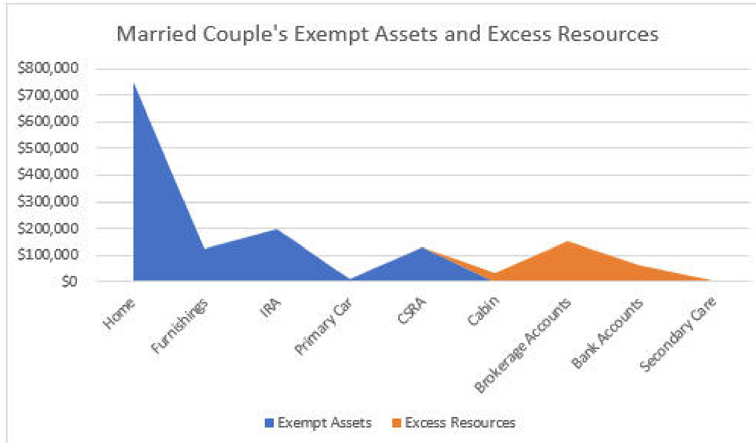
Henry is 68 and Wendy is 67. They have two children and have been married for over 30 years. In July 2018 Wendy was diagnosed with dementia. Henry has been caring for Wendy at home as best as he can. His health is now being compromised by the stress associated with caring for Wendy and the fear of financial devastation. The children are concerned. Wendy’s doctor has indicated that her condition has progressed to the point that she needs skilled nursing care and Henry reluctantly agrees. Wendy may be looking at a multiple-year stay in a skilled nursing facility as she is otherwise not suffering from any other ailments.

Here is a breakdown of their total assets:



1. $750,000.00 home, there is no mortgage
2. $350,000.00 Mammoth Lakes cabin that Wendy inherited 27 years ago. It has an assessed value of $30,000.00. Wendy has always expressed that she wants to keep it in the family for future generations.
3. $150,000.00 brokerage account
4. $60,000.00 in bank accounts
5. $150,000.00 Henry’s IRA
6. $50,000.00 Wendy’s IRA
7. $125,000.00 furnishings
8. $10,500.00 in vehicles, one worth $7,500.00 and another worth $3,000.00.

Total Value of all assets: $1,645,500.00



Column 1 Exempt Assets:

Exempt assets include the following:

1. $750,000.00 home
2. $125,000.00 furnishings
3. $150,000.00 Henry’s IRA because he is taking his RMDs
4. $50,000.00 Wendy’s IRA because she is taking her RMDs. The income from Wendy’s IRA, however, may be included in determining Wendy’s share of cost.
5. $7,500.00 for primary vehicle
6. $130,380.00 of additional exempt assets because of the Community Spouse Resource Allowance (CSRA). The CSRA can be applied towards assets that would otherwise be placed in the excess resource column. The assets protected by the CSRA would not be counted for eligibility purposes and are considered exempt for Wendy’s qualification purposes.

Total Value of Exempt Assets: $1,211,140.00

Column 2 Excess Resources:

1. $30,000.00 Mammoth Lakes Cabin. Although the cabin could sell for $350,000.00, it is worth the assessed value of $30,000.00 for Long-Term

Medi-Cal qualification purposes.
2. $150,000.00 brokerage accounts
3. $60,000.00 in bank accounts
4. $3,000.00 Second Car

Total Value of Non-Exempt Assets: $240,300.00

After deducting the Community Spouse Resource Allowance of $130,380.00 and the $2,000 property reserve from the total non-exempt Assets of $240,300.00, the value of assets that need to be Zeroed Out is $107,920.00.

Wendy is not currently eligible for Medi-Cal Long-Term Care benefits because their non-exempt property exceeds the property reserve by $107,920.00. How can the family Zero Out the excess resources and qualify Wendy?

POSSIBLE ZERO OUT STRATEGIES:

The Spend Down Approach: Using this strategy, Henry would spend the excess $107,920.00 on non-exempt assets for things like deferred maintenance or home improvement projects.

The Conversion Approach:
Henry could convert countable assets into uncountable exempt property by selling their home and the Mammoth Lakes Cabin and apply the excess cash resources to buy a larger residence. He could also sell both vehicles and purchase a new vehicle. This approach is not an option because the family does not want to move from the only home that they have ever known, and they want to keep their beloved cabin.

The Gifting Approach:
Henry could transfer all of their excess non-exempt assets using the stacked gifting approach to an Irrevocable Medi-Cal Asset Preservation Trust.

Combined Approach:
Henry can use a combination of all three approaches. The family can keep the Mammoth Lakes cabin for future generations due to its $30,000.00 assessed value by allocating it to the CSRA.

Recovery Protection:
All assets placed in an Irrevocable Medi-Cal Asset Preservation Trust would escape any recovery efforts. Moreover, the remaining balance of the IRAs would transfer to their children free of recovery. As long as Henry and Wendy do not have a “probate estate” their entire remaining nest egg will transfer to their children upon their deaths.

Medi-Cal Recovery

The State of California can seek reimbursement for payments made to beneficiaries under the Long-Term Care Medi-Cal program with the use of liens and estate claims. Liens are rare and are imposed to “lockdown” the property until the beneficiary dies. Estate claims are made against the estate following the death of a Long-Term Care Medi-Cal beneficiary. Both can be avoided with proper planning.

On January 1, 2017, Senate Bill 833 modified California’s recovery law. It contains the following key provisions:

1. Recovery claims are now prohibited against surviving spouses and registered domestic partners;

2. Recovery is limited to those 55 years of age or older to nursing home as well as home and community-based services; and,

3. **Recovery is permitted to only those assets that are subject to California probate proceedings.**

By far the most significant change was item No. 3. Items not subject to probate such as assets placed in a revocable or irrevocable trust, life insurance, retirement accounts as well as assets where a beneficiary is named all escape recovery. Recovery can now be completely eliminated with careful estate planning.

The Pursuit of Long-Term Care Medi-Cal is Not for Everyone

A nursing home resident that private pays has more options concerning nursing home placement. A pure private pay patient may receive a higher level of service that includes a private room. Moreover, pure private pay facilities tend to have more amenities and facilities that border on luxurious. These factors should be considered by the family.

Once a patient has been admitted to a Medi-Cal certified facility, they cannot be transferred or evicted simply because of a change from private pay to Medi-Cal. Thus, unless a person can pay privately for an indefinite period of time, they should seek out a nursing home that contracts with Medi-Cal.

Ultimately, the person needing long-term care should be placed in the least restrictive environment for the level of care needed. Options such as in-home care, an assisted living facility, or a board and care facility must be considered. Nest egg preservation is just one factor to be weighed. Placement should, in the end, be based upon what is in the best interest of the individual.

Long-Term Care Insurance

Long-Term Care Insurance can provide coverage for nursing homes, assisted living facilities, and in-home care. Cost is dependent on a number of variables that include the following:

1. Age & Health
2. Length of Coverage
3. Insurance Company Rating
4. Exclusions & Riders
5. Cost of Living Adjustment Provisions

Many Long-Term Care insurance policies do not cover the full cost of care for various reasons, resulting in the need to apply for Long-Term Care Medi-Cal to fill the gap. This is due in large part because long-term care expenses are increasing at a rate far greater than the cost of living adjustment provisions contained to the policy. Many companies have reduced coverage or exited the market entirely due to a lack of profitability.

Nevertheless, the fact remains that Long-Term Care Insurance can be a valuable planning tool. This is neither a recommendation that you cancel your insurance nor a recommendation that you don’t consider purchasing it. It is important that you know the details of your policy in order to make an informed decision.

VA Benefits

A detailed discussion of Veterans Benefits is beyond the scope of this eBook. If you are a veteran overwhelmed with the high cost of long-term care, the Veterans Aid and Attendance benefit could be the solution to help offset these rising care costs. It is important that you understand if the pursuit of these benefits should be made.

There are two general categories of Veterans Benefits. The first is service-connected benefits. The second is non-service-connected (pension) benefits. When dealing with long-term care planning, the "Aid and Attendance" program is the most commonly utilized. Aid and Attendance benefits are very important in the assisted living setting because there is no real meaningful and realistic alternative under the Long-Term Care Medi-Cal Program for assisted living.

VA Aid and Attendance Benefits

What are VA Aid and Attendance benefits? These benefits provide additional monthly payments to the total amount of a monthly VA pension received by qualified Veterans and survivors. If you or a loved one need help with daily activities or are housebound you may qualify for the VA Aid and Attendance allowance.

VA Aid and Attendance Eligibility Requirements

You may be eligible for this benefit if you get a VA pension and you meet at least one of the requirements listed below.

At least one of these must be true:

- You need another person to help you perform daily activities, like bathing, feeding, and dressing, or
- You have to stay in bed — or spend a large portion of the day in bed — because of illness, or
- You are a patient in a nursing home due to the loss of mental or physical abilities related to a disability, or
- Your eyesight is limited (even with glasses or contact lenses you have only 5/200 or less in both eyes; or concentric contraction of the visual field to 5 degrees or less)

Income Limitations for VA Aid and Attendance Benefits

If you qualify for VA Aid and Attendance benefits, your payment is based on the difference between your countable income and a limit that Congress sets (called the Maximum Annual Pension Rate, or MAPR).

Your countable income is how much you earn, including your Social Security benefits, investment and retirement payments, and any income your dependents receive. Some expenses, like non-reimbursable medical expenses (medical expenses not covered by your insurance provider) may reduce your countable income.

Your MAPR amount is the maximum amount of pension payable. Your MAPR is based on how many dependents you have, if you're married to another Veteran who qualifies for a pension, and if your disabilities qualify you for Housebound or Aid and Attendance benefits. MAPRs are adjusted each year for cost-of-living increases. You can find your current MAPR amount using the tables below.

Find your Maximum Annual Pension Rate (MAPR) amount:

Date of cost-of-living increase: December 1, 2020
Increase factor: 1.6%
Standard Medicare deduction: Actual amount will be determined by SSA based on individual income.

For Veterans with no dependents:

If you have no dependents and…	Your MAPR amount is (in U.S. $)
You don't qualify for Housebound or Aid and Attendance benefits	13,931
You qualify for Housebound benefits	17,024
You qualify for Aid and Attendance benefits	23,238

For Veterans with at least 1 dependent spouse or child:

If you have 1 dependent and…	Your MAPR amount is (in U.S. $)
You don't qualify for Housebound or Aid and Attendance benefits	18,243
You qualify for Housebound benefits	21,337
You qualify for Aid and Attendance benefits	27,540

RESOURCE: www.va.gov/pension/aid-attendance-housebound

Example: You're a qualified Veteran with a dependent, non-Veteran spouse and no children. You also qualify for Aid and Attendance benefits based on your disabilities. You and your spouse have a combined yearly income of $10,000.

Your MAPR amount = $27,540
Your yearly income = $10,000
Your VA pension = $17,540 for the year (or $1,461 paid each month)

A veteran's gross household income cannot exceed the Maximum Annual Pension Rate for an VA Aid and Attendance application, such as veteran claimant, survivor claimant, marriage and income rating. There are ways around this income limit if you work with a qualified VA planning attorney.

Veterans Benefits Requirements

Wartime Service

Must start with basic pension requirements before looking to medical evidence for improved pension with aid and attendance

i. 90 days of active military service if prior to September 7, 1980; or
ii. entered service after September 7, 1980 and has completed a continuous period of active duty of at least 24 months; and
iii. 1 day of wartime service
    1. Wartime Periods: M21-1MR, Part V, Subpart i, Chapter 1

World War II	December 7, 1941 through December 31, 1946
Korean Conflict	June 27, 1950 through January 31, 1955
Vietnam Era	August 5, 1964 through May 7, 1975; for veterans who served "in country" before August 5, 1964, February 28, 1961 through May 7, 1975
Gulf War	August 2, 1990 through a date to be set by law or Presidential Proclamation

Disability test

i. Two ways to meet the disability test
    1. Age 65 or older, OR
    2. Permanently and totally disabled, non-service connected. 38 CFR § 3.3(a)(3)(vi)
    a. Impairment is "reasonably certain" to continue throughout life. 38 CFR §3.340 - 3.342

Once disability test is met, can qualify for two additional benefits amounts

i. Housebound
    1. Criteria: A showing that claimant is "Permanently Housebound"
        a. Substantially confined to his or her dwelling (or ward if institutionalized) and immediate premises; and
        b. Will continue throughout claimant's lifetime.
    2. Criteria is the same if a surviving spouse is the claimant.
    3. Case construing Housebound requirement
        a. Hartness v. Nicholson (2006):
        b. Holding: housebound should not be construed to mean unable to leave the house at all, but rather unable to leave for the purpose of earning income.
        c. Also, changed housebound criteria to one combined disability rating of 60% if there is a service-connecting rating.

ii. Aid and Attendance Medi-Cal Criteria
    1. Aid and attendance presumed if
        a. Blind or nearly so
        b. Patient in a nursing home
    2. Make a factual showing
        a. Inability to dress or undress, keep oneself clean and presentable, frequent need of prosthetic adjustment, inability to feed oneself, inability to toilet, needs help ambulating (new with 10-18-18 rules; or
        b. Incapacity (physical or mental) that requires care or assistance on a regular basis; or
        c. Bedridden. 38 CFR §3.351(c) and 38 CFR §3.352

Conclusion

Nursing home costs in California average over one hundred and twenty thousand dollars ($120,000.00) annually. You now know that planning techniques and strategies employed by Elder Law attorneys exist that can protect your estate, including your home, allowing you to leave a legacy for your family. But, in order to avail yourself of these legal strategies, it is critical that your existing estate planning documents are long-term care compliant. Your living trust or will, as well as your medical and financial powers of attorney must have appropriate provisions to allow this type of planning to occur. Without an integrated, comprehensive Long-Term Care Medi-Cal compliant estate plan, an expensive and time-consuming Probate Conservatorship will be your only option.

The legal requirements for qualifying for Long-Term Care Medi-Cal rules are complex. It is fraught with traps and pitfalls. Your existing estate planning documents may need substantial modifications.You may need to create new documents. Change is constant and your documents must have sufficient flexibility to deal with future laws and regulations.

The myth that “you can only have $2,000.00 in your name” has resulted in tremendous damage, hardship, and anxiety for many families. The State of California does not provide a road map to help you navigate this area. If fact, the State of California would prefer that you spend down and completely exhaust most, if not all, of your resources. California is the beneficiary of the misconceptions prevalent in this area because so many people leave money on the table that could have been protected had they only known better.

PRESERVATION NATION

If you are interested in a free long-term care estate planning review for your existing estate planning documents or are interested in establishing a new long-term care estate plan, please contact Christopher E. Botti at chrisb@PreservationNationLaw.com or by calling (833) 6PRESERV or (833) 677- 3737 to get the process started. All legal services are provided by Botti & Morison Estate Planning Attorneys, Ltd.

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